Hadi bin Hassan v Suria Records Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–1328 OF 2003
ABDUL MALIK ISHAK J
14 FEBRUARY 2005

Civil Procedure — Admission — Out of court admissions — Admissibility

Civil Procedure — Pleadings — Matters to be pleaded — Material facts only and not evidence — Rules of the High Court 1980 O 18 r 7 (1)

Civil Procedure — Pleadings — Striking out — Part of statement of claim — Contravention of 'without prejudice' rule — Whether should be struck out — Rules of the High Court 1980 O 18 r 19

Contract — Compromise agreement — Agreement to compromise cause of action — 'Actual' or 'potential' dispute — No pending litigation — Out of court settlement

Evidence — Privilege — Scope of privilege — Waiver of privilege — Whether voluntarily made admission may be privileged — Whether communications made with a view to settle disputes between parties are privileged

Evidence — Without prejudice communications — Proposals and statements in course of negotiation — Privilege — Whether such written and oral communications were admissible as evidence — Whether communication must be specifically stated to be without prejudice for it to be privileged

The plaintiff sued the defendants claiming that the third defendant had infringed the copyright in the plaintiff's song. Prior to commencement of the action, several meetings and discussions were held between the plaintiff and third defendant where the plaintiff had repeatedly threatened the third defendant to take legal action if the third defendant did not admit to the infringement. The third defendant upon the plaintiff's insistence, wrote an admission ('the written admission'). The plaintiff in turn gave the third defendant an undertaking that the plaintiff would not take any legal action against the third defendant or lodge a police report against the third defendant. At the meetings with the plaintiff the third defendant was not advised by a lawyer nor was he made aware of his legal rights. During their discussions, the plaintiff and the third defendant had used the phrase 'out of court settlement' on a number of occasions. However, later the plaintiff sued and para 11 of the plaintiff's statement of claim referred to the written admission of the third defendant. The third defendant applied under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('RHC') and under the inherent jurisdiction of the court under O 92 r 4 of the RHC praying *inter alia*: (i) that para 11 of the statement of claim be struck out; and (ii) that the written admission of the third defendant be excluded from disclosure and rendered inadmissible as evidence in the

action. The learned senior assistant registrar heard and dismissed the third defendant's application. The third defendant appealed to the judge in chambers.

One of the issues was whether pursuant to the 'without prejudice' rule, the third defendant's hand written admission could be referred to or disclosed in the proceedings. The plaintiff argued that there were no negotiations for settlement and that there were no prior dispute to warrant negotiations for a settlement and neither was there any pending litigation.

Held, allowing the third defendant's appeal:

(1) The dispute over the copyright infringement of a song by way of a compromise had settled the matter, once and for all, between the parties. The foundation for such a compromise lies in the concept of public policy known to all and sundry. The first being the need for there to be an end to the dispute. The second being the principle that it would be desirable that the parties be held to their bargains. Both the plaintiff and the third defendant must surely be held to their bargains. Paragraph 11 of the statement of claim must be struck out and likewise the written admission of the third defendant must be excluded from disclosure and rendered, accordingly, inadmissible as evidence in this action (see para 23).

(2) All the meetings were designed for the parties to meet and settle their disputes amicably. The fact that these attempts at settlement failed was not disputed. Communications made with a view to settle disputes between the parties must be held to be privileged communications and outside the purview of the courts (see para 37). Genuine negotiations with a view to settlement are certainly protected from disclosure whether or not the 'without prejudice' label has been expressly applied to the negotiations or otherwise (see para 38).

(3) The phrase 'out of court settlement' can refer to a civil resolution between the parties without any pending litigation. It can even refer to a situation where there has been a pending litigation and the parties thereto meant to resolve the dispute without proceeding further with the litigation. The plaintiff's claim that litigation must be pending in court before the 'without prejudice' communications can take place cannot be accepted (see para 39).

(4) The presence of the plaintiff's counsel at the third meeting clearly demonstrated that the meeting was held on a 'without prejudice' basis. And the fact that there was in existence a written undertaking by the plaintiff not to take any legal action against the third defendant or to lodge any police report against the third defendant weighed heavily in favour of the third defendant (see para 48).

(5) The 'without prejudice' tag need not be written on the document in order to prevent that document from being given in evidence. Of crucial importance is to look at the surrounding circumstances in order to ascertain whether the parties were indeed seeking to compromise the dispute. And if that can be seen from the surrounding circumstances then the 'without prejudice' rule would be put in motion. The underlying purpose of the 'without prejudice' rule is basically to protect a potential litigant from being embarrassed by any admission made purely in an attempt to achieve an amicable settlement (see para 53). In exhibiting the third defendant's hand written admission, the plaintiff has clearly transgressed the 'without prejudice' rule. The third defendant's written admission must surely prejudice the third defendant's defence (see para 54).

(6) Paragraph 11 of the statement of claim referred to the substance of the privileged communications between the plaintiff and the third defendant. The plaintiff was relying on the third defendant's written admission as evidence of his claim. This would run counter to O 18 r 7(1) of the RHC. Pleadings should be statements drafted in a summary form and should state only the material facts relied upon and not the evidence by which they are to be proved (see para 49).

(7) There was no denial by the plaintiff that he had given an undertaking to the third defendant that he would not take legal action against the third defendant. In the absence of such a denial, it must be construed to be admitted (see para 55).

(8) It was the plaintiff who by his words or conduct had made a representation of fact with the intention of inducing the third defendant on the faith of that representation to alter his position, and the plaintiff was subsequently estopped from denying as against the third defendant that the facts were as represented (see para 55).

(9) As phrased and framed, para 11 of the statement of claim was clearly frivolous and to let it remain would tantamount to an abuse of the process of the court. The words 'frivolous or vexatious' refer to cases which are obviously unsustainable in the context of the 'without prejudice' rule (see para 56).

(10) The words 'it may prejudice, embarrass or delay the fair trial of the action' as set out in O 18 r 19(1)(c) of the RHC must be given a wide and liberal interpretation. The prejudice that the third defendant would suffer by the presence of para 11 of the statement of claim can never be quantified. The fair trial of the action would be prejudiced if para 11 of the statement of claim was allowed to remain (see para 57).

(11) Striking out for being an abuse of the process of the court under O 18 r 19(1)(d) of the RHC envisages the situation where the process of the court has not been used in a *bona fide* manner and that it has been abused.

The court will prevent its machinery from being used improperly. It was an abuse of the process of the court when the plaintiff incorporated para 11 to the statement of claim because it contravened the 'without prejudice' rule. Contravention of this rule too necessitated the striking out of the same paragraph under the inherent jurisdiction of the court as envisaged under O 92 r 4 of the RHC (see para 58).

[**Bahasa Malaysia summary**

Plaintif mendakwa bahawa defendan ketiga telah melanggar hak cipta dalam lagu plaintif. Sebelum memulakan tindakan undang-undang, beberapa mesyuarat dan perbincangan telah diadakan di antara plaintif dan defendan ketiga. Defendan ketiga atas desakan plaintif, telah menulis satu 'pengakuan' ('pengakuan tersebut'). Plaintif pula telah memberikan defendan ketiga satu akujanji bahawa plaintif tidak akan mengambil apa-apa tindakan undang-undang terhadap defendan ketiga atau membuat laporan polis terhadap defendan ketiga. Dalam mesyuarat-mesyuarat dengan plaintif, defendan ketiga tidak dinasihati oleh mana-mana peguam dan juga tidak disedarkan mengenai hak-haknya di bawah undang-undang. Dalam perbincangan-perbincangan mereka, plaintif dan defendan ketiga telah menggunakan frasa 'penyelesaian di luar mahkamah' beberapa kali. Walau bagaimanapun, plaintif kemudiannya telah memulakan tindakan undang-undang dan perenggan 11 penyata tuntutan plaintif yang merujuk kepada pengakuan bertulis defendan ketiga. Defendan ketiga telah memohon di bawah A 18 k 19 (1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan di bawah bidang kuasa sedia ada mahkamah menurut A 92 k 4 KMT menuntut *inter alia:* (i) supaya perenggan 11 penyata tuntutan plaintif dibatalkan; dan (ii) supaya pengakuan bertulis defendan ketiga disingkirkan daripada pendedahan dan dijadikan tidak boleh diterima sebagai keterangan di dalam guaman itu. Penolong kanan pendaftar yang bijaksana telah mendengar dan menolak permohonan defendan ketiga. Defendan ketiga merayu kepada hakim dalam kamar.

Salah satu daripada isu yang berbangkit ialah sama ada berdasarkan rukun 'tanpa prejudis' pengakuan bertulis defendan ketiga boleh dirujuk kepada atau didedahkan di dalam prosiding. Plaintif berhujah bahawa tiada rundingan untuk penyelesaian dan bahawa tidak ada pertikaian lebih terdahulu yang memerlukan rundingan untuk penyelesaian dan juga bahawa tidak ada apa-apa guaman yang masih belum diputuskan.

Diputuskan, membenarkan rayuan defendan ketiga:

(1) Pertikaian tersebut di atas pelanggaran hak cipta sebuah lagu secara kompromi telah menyelesaikan isu itu secara muktamad di antara pihak-pihak. Asas bagi kompromi sebegitu adalah dalam konsep polisi awam yang diketahui umum. Pertamanya keperluan bagi mengadakan satu penamatan bagi pertikaian. Keduanya ialah prinsip bahawa adalah wajar

bagi memastikan yang pihak-pihak berpegang kepada persetujuan mereka. Perlu dipastikan yang kedua-dua plaintif dan defendan ketiga berpegang kepada persetujuan mereka. Perenggan 11 penyata tuntutan perlu dibatalkan dan pengakuan bertulis defendan ketiga juga perlu disingkirkan daripada pendedahan dan dijadikan sebagai tidak boleh diterima sebagai keterangan di dalam tindakan ini (lihat perenggan 23).

(2) Kesemua mesyuarat telah dirancang untuk pihak-pihak bertemu dan menyelesaikan pertikaian mereka secara aman. Bahawa percubaan-percubaan ini telah gagal adalah tidak dipertikaikan. Komunikasi-komunikasi yang dibuat yang bertujuan menyelesaikan pertikaian di antara pihak-pihak adalah semestinya komunikasi terlindung dan oleh yang demikian adalah di luar bidang kuasa mahkamah (lihat perenggan 37). Rundingan sejati yang bertujuan mencapai penyelesaian adalah semestinya dilindungi daripada pendedahan tidak kira sama ada tanda 'tanpa prejudis' digunakan secara nyata pada rundingan atau tidak (lihat perenggan 38).

(3) Frasa 'penyelesaian di luar mahkamah' boleh merujuk kepada penyelesaian sivil di antara pihak-pihak tanpa perlu adanya apa jua guaman yang belum diselesaikan. Ianya boleh juga merujuk kepada satu situasi di mana terdapat guaman yang belum diselesaikan dan pihak-pihak kepadanya berhasrat menyelesaikannya tanpa meneruskan guaman itu. Hujahan plaintif bahawa perlu ada guaman yang belum diselesaikan di mahkamah sebelum komunikasi 'tanpa prejudis' boleh dilakukan tidak boleh diterima (lihat perenggan 39).

(4) Kehadiran peguam plaintif pada mesyuarat ketiga dengan jelas menunjukkan bahawa mesyuarat tersebut telah diadakan atas dasar 'tanpa prejudis'. Kewujudan akujanji bertulis oleh plaintif bahawa dia tidak akan mengambil apa-apa tindakan undang-undang terhadap defendan ketiga atau membuat apa-apa laporan polis terhadap defendan ketiga adalah berpihak secara kuat kepada defendan ketiga (lihat perenggan 48).

(5) Tanda 'tanpa prejudis' tidak perlu ditulis pada dokumen untuk menghalang dokumen tersebut daripada diberikan secara keterangan. Adalah amat penting untuk mengkaji keadaan sekeliling bagi tujuan memastikan sekiranya pihak-pihak benar-benar berhasrat untuk mencari satu kompromi bagi pertikaian itu. Sekiranya ini dapat dipastikan daripada keadaan sekeliling, maka rukun 'tanpa prejudis' akan menjadi terpakai. Tujuan dasar rukun 'tanpa prejudis' ialah untuk melindungi seseorang bakal litigan daripada dihalang oleh apa-apa pengakuan yang telah dibuat semata-mata untuk tujuan mencuba mencapai satu penyelesaian aman (lihat perenggan 53). Dalam mengeksibit pengakuan bertulis defendan ketiga, plaintif telah jelasnya melanggar rukun 'tanpa prejudis'. Pengakuan bertulis defendan ketiga akan tentunya memprejudiskan pembelaan defendan ketiga (lihat perenggan 54).

(6) Perenggan 11 penyata tuntutan telah merujuk kepada intipati komunikasi terlindung di antara plaintif dan defendan ketiga. Plaintif telah bergantung kepada pengakuan bertulis defendan ketiga sebagai bukti tuntutannya. Ini adalah bertentangan dengan A 18 k 7(1) KMT. Pliding semestinya mengandungi pernyataan-pernyataan yang diderafkan dalam bentuk ringkas dan perlu menyatakan hanya fakta-fakta material yang akan digantung kepada dan bukannya keterangan yang akan digunakan untuk membuktikannya (lihat perenggan 49).

(7) Plaintif tidak menafikan yang dia telah memberikan satu akujanji kepada defendan ketiga bahawa dia tidak akan memulakan tindakan undang-undang terhadap defendan ketiga. Oleh kerana tiadanya sebarang penafian, maka ianya perlu diambil sebagai diakui (lihat perenggan 55).

(8) Plaintif sendiri melalui perkataannya dan kelakuannya telah membuat representasi fakta dengan tujuan mendorong defendan ketiga atas kepercayaan pada representasi tersebut untuk mengubah keadaannya, dan plaintif adalah selepas dari itu diestop dari menafikan terhadap defendan ketiga fakta-fakta yang telah direpresentasikan (lihat perenggan 55).

(9) Sebagaimana ianya difrasa dan digubah, perenggan 11 penyata tuntutan adalah dengan jelasnya remeh dan untuk membiarkannya begitu akan bersamaan dengan penyalahgunaan proses mahkamah. Perkataan 'remeh atau menyusahkan' merujuk kepada kes-kes yang jelasnya tidak boleh dibenarkan dalam konteks rukun 'tanpa prejudis' (lihat perenggan 56).

(10) Perkataan 'mungkin menjejaskan, menghalang atau melengahkan perbicaraan tindakan itu dengan adil' seperti yang diperuntukkan di bawah A 18 k19(1)(c) KMT perlu diberikan tafsiran yang meluas. Prejudis yang defendan ketiga akan alami akibat adanya perenggan 11 penyata tuntutan tidak boleh ditaksirkan. Perbicaraan tindakan itu dengan adil juga akan diprejudiskan sekiranya perenggan 11 penyata tuntutan dibenarkan berada di situ (lihat perenggan 57).

(11) Pembatalan atas alasan penyalahgunaan proses mahkamah di bawah A18 k 19(1)(d) KMT membayangkan situasi di mana proses mahkamah tidak digunakan secara *bona fide* dan bahawa ianya disalahgunakan. Mahkamah akan menghalang fungsinya daripada disalahgunakan. Adalah satu penyalahgunaan proses mahkamah apabila plaintif memasukkan perenggan 11 penyata tuntutan kerana ia melanggar rukun 'tanpa prejudis'. Pelanggaran rukun ini juga memerlukan perenggan yang sama dibatalkan di bawah bidang kuasa sedia ada mahkamah seperti mana yang diperuntukkan di bawah A 92 k 4 KMT (lihat perenggan 58).]

Notes

For a case on admissibility of out of court admissions, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 269.

For cases on matters to be pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4594.

For cases on striking out of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4677–4737.

For a case on agreement to compromise cause of action, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2650.

For cases on proposals and statements in course of negotiation, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2468–2469.

For cases on without prejudice communications generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2452–2470.

For cases on priviledge generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2056–2095.

Cases referred to

AG of Duchy of Lancaster v L & NW Ry (1892) 3 Ch p 277 (refd)
Amalgamated Steel Mills Bhd v Ingeback (Malaysia) Sdn Bhd [1990] 2 MLJ 374 (refd)
Berdan v Greenwood (1878) 3 Ex D 256 (refd)
Carr v London & North Western Railway Co (1875) LR 10 CP 307
Castro v Murray (1875) 10 Ex 213 (refd)
Cook v Wright (1861) 1 B & S 559 (refd)
Cory v Bretton (1830) 4 C&P 462 (refd)
Cutts v Head and another [1984] 1 All ER 597 (refd)
Daintrey, ex parte Hol, Re (1893) 2 QB 116 (refd)
Day v William Hill (Park Lane), Ltd [1949] 1 KB 632 (refd)
E Hulton & Co Ltd v Chadwick, Taylor & Co (1919) 122 LT 66 (refd)
Grace v Baynton (1877) 21 Sol Jo 631 (refd)
Hammer v Flight (1876) 24 WR 347 (refd)
Harris, ex parte Harris, Re (1875) 44 LJ Bey 33 (refd)
Hoghton v Hoghton (1852) 15 Beav 278 (refd)
Hopgood v Brown [1955] 1 All ER 550 (refd)
India Rubber, Gutta Percha, and Telegraph Works Co Ltd v Chapman (1926) 20 BWCC 184 (refd)
Kitcat v Sharp (1882) 48 LT 64 (refd)
Knowles v Roberts (1888) 38 Ch D 263 (refd)
La Roche v Armstrong [1922] 1 KB 485 (refd)
Law v Dearnley [1950] 1 All ER 124 (refd)
Liardet v Hammond Electric Light Co (1883) 31 WR 710 (refd)
Mc Taggart v Mc Taggart (1949) P 94, [1948] 2 All ER 754 (refd)
Mercantile Investment and General Trust Co v International Co of Mexico (1893) 1 Ch 484 (refd)
Miller, Re (1884) 54 LJ Ch 205 (refd)
Mudge v Penge UDC (1916) 85 LJ Ch 814 (refd)
Oh Kuang Liang v Associated Wood Ind Sdn Bhd [1995] 4 MLJ 390 (refd)
Oliver v Nautilus Steam Shipping Co [1903] 2 KB 639 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)
Paddock v Forrester (1842) 3 Scott NR 715 (refd)
Peacock v Harper (1877) 26 WR 109 (refd)
Plumley v Horrell (1869) 20 LT 473 (refd)
Public Prosecutor v Neoh Boon Cheong [1960] MLJ 31 (refd)
Rassam v Budge [1893] 1 QB 571 (refd)
River Steamer Co, Re Mitchell's Claim (1871) 6 Ch App 822 (refd)
Rush & Tompkins Ltd v Greater London Council [1989] 1 AC 1280 (refd)
Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151 (refd)
Smith v Blandford Gee Cementation Co Ltd [1970] 3 ALL ER 154 (refd)
Sneath v Valley Gold Ltd (1893) 1 Ch 477 (refd)
South Shropshire District Council v Amos (1986) 1 WLR 1271 (refd)
Ted Bates (M) Sdn Bhd v Balbir Singh Jholl [1979] 2 MLJ 257 (refd)
Tomlin v Standard Telephones & Cables Ltd (1969) 1 WLR 1378 (refd)
Waldridge v Kennison (1794) 1 Esp 143 (refd)
Walker v Wilsher [1889] 23 QBD 335 (refd)
Whiffen v Hartwright (1848) 11 Beav 111 (refd)
Whitworth v Darbishire (1893) 68 LT 216 (refd)
Williams v Thomas (1862) 2 Drew & Sm 29 (refd)
Young v Holloway (1895) P 90 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 rr 7 (1), 19 (1) (b), (c), (d), O 92 r 4

Othman bin Mahfar (Othman & Assoc) for the plaintiff.
Wendy Lam Mei Kuan (V Chong W Lam) for the third defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] By way of an application in encl 12 styled as the summons in chambers, the third defendant by the name of Zulkefli bin Majid sought for the following prayers:

(i) that para 11 of the statement of claim be struck out;

(ii) that the written admission of the third defendant referred to in para 11 of the statement of claim be excluded from disclosure and rendered inadmissible as evidence in this action; and

(iii) that the costs of this application be borne by the plaintiff.

[2] The third defendant's application in encl 12 was made pursuant to O18 r 19 (1) (b), (c) and (d) of the Rules of the High Court 1980 ('RHC') and under the inherent jurisdiction of the court as encapsulated in O 92 r 4 of the RHC.

[3] In its original text, para 11 of the statement of claim was worded in this way:

> Pada 17 Julai 2003, defendan ketiga telahpun membuat satu pengakuan bertulis kepada plaintif tanpa sebarang ugutan atau paksaan bahawa beliau mengaku iaitu lagu ciplak hasil ciptaannya telah diambil dari lagu asal plaintif. (Plaintif akan merujuk kepada pengakuan bertulis tersebut ketika perbicaraan penuh kelak.)

[4] The English language translation of para 11 of the statement of claim was not provided for but, in simple English, it would be worded in this way:

> On 17 July 2003, the third defendant without any threat or force had made a written admission to the plaintiff admitting that he had infringed the copyright song belonging to the plaintiff. (The said written admission will be referred to in the course of the trial.)

[5] The written admission by the third defendant in the Malay language has been exhibited as exh 'HBH–1' to the affidavit of the plaintiff that was affirmed on 2 March 2004 as seen in encl 13. It was a hand written admission and it was phrased in this way:

> PENGAKUAN BERTULIS
>
> Bahawasanya saya ZULKEFLI MAJID NO K/P 720901–14–5107 (AIMAN) membuat pengakuan, yang lagu bertajuk 'Tetap Di Sini' nyanyian Siti Nurhaliza didalam video klip 'Paloh' dan album Best of Original Soundtrack adalah satu lagu yang telah diambil dari lagu asal yang bertajuk 'KEMBALI' nyanyian Mary Doreen Jackson hasil ciptaan Hadi bin Hassan I/C 7007327.
>
> Pengakuan bertulis ini dibuat atas kerelaan saya sendiri tanpa apa-apa jenis paksaan dan ugutan oleh mana-mana pihak.
>
> Pengakuan oleh Zulkefli Majid 720901–14–5107
> 17 Julai 2003 – 7.45mlm
> tt (Illegible)
>
> Saksi (1)
>
> MOHD ADLI OTHMAN
> I/C: 780325–02–6111
> tt (Illegible)
>
> Saksi (2)
>
> Shamsuddin Amir Hussain
> I/C: 5482586
> tt (Illegible)

Saksi (3)

OTHMAN MAHMOOD
I/C: 731026–01–6625
tt (Illegible).

[6] In due course, the learned senior assistant registrar ('SAR') heard the third defendant's application in encl 12 and she dismissed it forthwith. The SAR also ordered that costs be costs in the cause. Aggrieved by the decision of the SAR, the third defendant filed an appeal to the judge in chambers as reflected in encl 14.

[7] Now, all letters written and all oral communications made between the parties during a dispute for the purpose of settling the dispute (*Grace v Baynton* (1877) 21 Sol Jo 631; *Kitcat v Sharp* (1882) 48 LT 64; *Re Daintrey, ex parte Holt* (1893) 2 QB 116 and *E Hulton & Co Ltd v Chadwick, Taylor & Co* (1919) 122 LT 66, HL) which are expressed or proved to have been made *'without prejudice'* cannot, in law, be admitted in evidence (*Waldridge v Kennison* (1794) 1 Esp 143; *Paddock v Forrester* (1842) 3 Scott NR 715; *Whiffen v Hartwright* (1848) 11 Beav 111; *Hoghton v Hoghton* (1852) 15 Beav 278; *Re Daintrey, ex parte Holt*; *Cory v Bretton* (1830) 4 C&P 462 and *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822 at 831). This privilege is unique. It covers not only the particular letter in question but also extends to all the subsequent parts of the same correspondence on both sides even though they are not expressed to be *'without prejudice'* (*Paddock v Forrester*; *Re Harris, ex parte Harris* (1875) 44 LJ Bey 33; *Peacock v Harper* (1877) 26 WR 109; *Oliver v Nautilus Steam Shipping Co* [1903] 2 KB 639, CA; and *India Rubber, Gutta Percha, and Telegraph Works Co Ltd v Chapman* (1926) 20 BWCC 184, CA). But, if there is a clear break in the chain of correspondence to categorically show that the ensuing letters are open (as per Lord Hanworth MR in *India Rubber, Gutta Percha, and Telegraph Works Co Ltd v Chapman* at p 188) then the '*without prejudice*' rule will not apply. It has been held that the privilege would also cover an open letter followed by another letter from the same party to say to the effect that their communications were intended to be '*without prejudice*'. Indeed in *Peacock v Harper*, Hall VC was reported to have said that the second letter must be taken as a mere postscript to the former. It is a correct assertion of the law to say that the privilege attaches not only for the purposes of the action in which it was written (*Stretton v Stubbs* (1905) Times, dated 28th February) but it also extends, far and wide, to cover and protect the solicitor who writes the letter in question as well as for the client in question (*La Roche v Armstrong* [1922] 1 KB 485).

[8] The privilege can only be waived if both the parties to the dispute consent to it (*Mc Taggart v Mc Taggart* (1949) P 94, [1948] 2 All ER 754, CA) notwithstanding that there has been only one communication (*Walker v Wilsher* [1889] 23 QBD 335, CA which disapproves the contrary opinion as expressed by the court in *Williams v Thomas* (1862) 2 Drew & Sm 29). Here, in the

context of the present case, the third defendant holds steadfastly to the privilege that has been accorded to him under the law. A compromise cannot arise until some dispute or some difference of view exists between the parties where by agreement they decide to resolve. It is not necessary that there will be a pending litigation before a compromise can be reached (*Cook v Wright* (1861) 1 B & S 559; and *Mercantile Investment and General Trust Co v International Company of Mexico* (1893) 1 Ch 484 at p 494, per Lindley LJ). There must, however, be some '*actual*' or '*potential*' dispute (*Sneath v Valley Gold Ltd* (1893) 1 Ch 477) before a compromise comes into existence.

[9] With these brief legal semantics, I will now allude to the facts of the case.

FACTS OF THE CASE

[10] The plaintiff's cause of action centered on copyright infringement of a song. The plaintiff claimed that he is the author and lyricist of a song entitled '*Kembali*' sung by one Mary Doreen Jackson. The plaintiff claimed that the third defendant has infringed his copyright because the third defendant's song entitled '*Tetap Di Sini*' sung by the famous singer by the name of Siti Nurhaliza was copied from the plaintiff's song entitled '*Kembali*'.

[11] Now, it must be emphasised that the first and the second defendants are recording companies and they have been licensed by the third defendant to reproduce the third defendant's song entitled '*Tetap Di Sini*'.

[12] The following pertinent events should be narrated.

[13] On 17 July 2003, the plaintiff accompanied by Othman Mahmood, Sham Amir Hussin (hereinafter referred to as '*Abang Sham*') and another man met with the senior manager of the first defendant as well as the third defendant at the first defendant's office (hereinafter this meeting would be referred to as the '*first meeting*'). It is germane to point out that the plaintiff has never denied that the first meeting actually took place and, in fact, the plaintiff has referred to it in para 7(a) of the plaintiff's reply to the first and the second defendants' defence. Now, at the first meeting, only the edited portions of the song entitled '*Kembali*' was played to the senior manager of the first defendant bearing in mind that the managing director of the first defendant was at that time in Indonesia. The third defendant was also present when the edited portions of the song entitled '*Kembali*' was being played. Unfortunately, what transpired at the first meeting did not constitute sufficient or satisfactory proof of infringement of the copyright and neither was settlement reached between the parties at that first meeting. Towards the end of the first meeting, the plaintiff then proceeded to invite the third defendant to go to 'Kedai Tomyam' at Taman Midah in order to continue the discussion on the subject matter of infringement of the plaintiff's song entitled '*Kembali*'. This meeting at the 'Kedai Tomyam' constituted the '*second meeting*'.

[14] It must be emphasised that the third defendant knew and is well acquainted with Abang Sham. The latter was formerly the artiste and repertoire manager of the first defendant. To be precise, Abang Sham was also the producer of several albums of the popular local boy band known as the '2 By 2' where the third defendant is one of the singers. So it was not a surprise that on the advice of Abang Sham, the third defendant agreed to meet with the plaintiff at the 'Kedai Tomyam'. In fact, Abang Sham went with the third defendant in the third defendant's car to the 'Kedai Tomyam'.

[15] Reverting back to the first meeting, it must be recalled to mind that at that meeting the third defendant was threatened by the plaintiff. The threat went like this. That the third defendant has infringed the plaintiff's copyright and if the third defendant did not admit to it, the plaintiff would be able to secure a warrant of arrest against the third defendant within three days thereof.

[16] Now, at the second meeting the plaintiff repeated the same threat in regard to the issuance of the warrant of arrest. The plaintiff too told the third defendant that the plaintiff has met his lawyers and that they were prepared to take action against the third defendant. The plaintiff also said that the third defendant must pay at least RM700,000 to RM800,000 as compensation for infringing the plaintiff's copyright. The threats were taken seriously by the third defendant. Fear was instilled in the mind of the third defendant and he agreed to resolve the matter. But the plaintiff refused to accept the verbal assurances of the third defendant and vehemently insisted that the third defendant wrote an '*admission*' that evening itself, failing which the plaintiff would lodge a police report against the third defendant. The third defendant gave in to the plaintiff's repeated threats and agreed to make an '*admission*' provided that the plaintiff in turn gave the third defendant his undertaking that the plaintiff would not take any legal action against the third defendant or lodge a police report against the third defendant. It must be emphasised that at these meetings — referring to the first meeting and the second meeting, the third defendant was not advised by a lawyer nor was he made aware of his legal rights. Abang Sham, whom the third defendant fully trusted, advised him to make an admission so that the problem could be resolved. The third defendant acted on Abang Sham's advice and he accordingly gave the '*admission*'. It was submitted that the third defendant believed the plaintiff's undertaking to the fore.

[17] The plaintiff then wrote out his undertaking that he will not take any legal action against the third defendant or lodge a police report on a separate piece of paper. Abang Sham, Othman and one person by the name of Adli signed on the plaintiff's undertaking as witnesses. The plaintiff then directed Adli to write out an '*admission*' for the third defendant and this was accordingly done. The plaintiff also instructed the third defendant to copy the said '*admission*'. The third defendant complied. When the third defendant finished

copying and signing the said '*admission*', Abang Sham, Othman and Adli also signed the said '*admission*' as witnesses. The plaintiff then kept the 'admission' together with his undertaking because he wanted to stamp them so that the documents may have legal effect. The plaintiff promised to give the third defendant a copy of the '*admission*' as well as the plaintiff's undertaking after the '*stamping*' has been done which was supposed to be on the next day. The plaintiff also promised to meet the third defendant together with the representatives of the first and the second defendants in order to discuss, *inter alia*, the issue of royalty payment.

[18] Unfortunately, a copy of the stamped '*admission*' was never given to the third defendant. Even a copy of the plaintiff's undertaking was not forwarded to the third defendant. Repeated requests by the third defendant for these documents fell on deaf ears.

[19] I have reproduced the hand written admission of the third defendant in the early part of this judgment and I must say that the hand written admission was not even stamped. It was submitted that the plaintiff's intention, at all material times, was to mislead and deceive the third defendant into giving an '*admission*' which was said to be the plaintiff's trump card at the third meeting with the defendants. It was submitted, time and again, that the third defendant was not well versed in law and that he did not receive any legal advice whatsoever before being hoodwinked into giving the said '*admission*'. I was asked to take note that the third defendant is a gullible young man who believed in his friend by the name of Abang Sham to the extent that the third defendant was willing to sign the said '*admission*' and believing that by doing so his troubles will all go away like a bad dream. What a wishful thinking!

[20] Now, when the managing director of the first defendant returned from Indonesia, the third defendant arranged for a meeting at the first defendant's office with the plaintiff on 5 August 2003 (hereinafter referred to as the '*third meeting*'). At that third meeting, the plaintiff was accompanied by Othman, Adli and the plaintiff's counsel by the name of Mr Othman Mahfar and they met the third defendant as well as the representatives of the first and the second defendants. That third meeting came to naught. It was not fruitful and nothing came out of it. No settlement was reached at that third meeting. The plaintiff himself readily admitted that there has been a series of meetings to resolve the copyright dispute but they were all unsuccessful. As I said there must be a dispute before a compromise comes into the picture.

[21] I must highlight two vintage cases. The first would be the case of *Plumley v Horrell* (1869) 20 LT 473 where Lord Romilly MR aptly said:

> *Prima facie* everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of compromise. When I compromise a law suit with my adversary, I mean that the question is not to be tried over again.

[22] The second would be the case of *Knowles v Roberts* (1888) 38 Ch D 263 at p272 where Bowen LJ succinctly sets out the legal position in this way:

> As soon as you have ended a dispute by a compromise you have disposed of it.

[23] That would certainly apply to the facts of the present case. The dispute over the copyright infringement of a song by way of a compromise has settled the matter, once and for all, between the parties. The foundation for such a compromise lies in the concept of public policy known to all and sundry. The first being the need for there to be an end to the dispute or what is commonly referred to as interest *reipublicae ut sit finis litium.* The second being the principle that it would be desirable that the parties be held to their bargains. In my judgment, both the plaintiff and the third defendant must surely be held to their bargains. Paragraph 11 of the statement of claim must be struck out and likewise the hand written admission of the third defendant must be excluded from disclosure and rendered, accordingly, inadmissible as evidence in this action.

THE ARGUMENTS OF THE PLAINTIFF

[24] The plaintiff argued that the third defendant's appeal in encl 14 should be dismissed with costs for the following reasons:

(a) that there were no negotiations for settlement, merely meetings to ascertain the identity of 'Aiman';

(b) that the purpose of the negotiations at the second meeting was not meant to settle the dispute;

(c) that there were no prior dispute to warrant negotiations for a settlement and neither was there any pending litigation; and

(d) that para 11 of the statement of claim was merely part of the sequence of events.

[25] I will now examine briefly the arguments of the plaintiff.

Argument (a)

[26] To say that the meetings were held in order to ascertain the identity of '*Aiman*' was nothing but a lie. The plaintiff knew that the third defendant was known as '*Aiman*'. Even before the dispute arose the plaintiff knew the third defendant because they were in the same field. Paragraph 9 (a) of the statement of claim was worded in this way (in its original text):

> Selain daripada itu, plaintif mendapat tahu bahawa lagu ciplak tersebut telah diambil atau ditiru dari lagu asal paintif oleh defendan ketiga yang dikenali oleh paintif sebelum ini kerana terlibat dalam bidang yang sama.

and there was no mention whatsoever that the plaintiff did not know who 'Aiman' was. The plaintiff relied on paras 16(a) and 16(b) of his own affidavit in reply in encl 13 to bolster up his arguments that the meetings were meant

to ascertain the identity of 'Aiman'. In reality, paras 16(a) and 16(b) of the plaintiff's affidavit in reply in encl 13 said something else. It averred on some other points. I will now reproduce those paragraphs in its original text:

> 16(a) Saya turut menegaskan bahawa defendan ketiga sendiri telah menetapkan syarat kepada saya agar tindakan undang-undang tidak dikenakan terhadap beliau jika memberikan pengakuan bertulisnya dan ini secara tidak langsung menunjukkan bahawa defendan ketiga secara tersirat yang tidak amanah, suci hati dan berniat jahat kerana mengetahui akan perbuatan salahnya itu dari awal lagi walaupun saya hanya inginkan kebenaran sahaja daripada beliau.
>
> 16(b) Kemudian, saya dapati bahawa defendan ketiga sendiri telah membuat pengakuan terbuka di dalam sebuah akhbar tempatan yang mana saya percaya bahawa pengakuan itu juga dibuat tanpa paksaan sesiapapun. Dilampirkan di sini sesalinan keratan akhbar tersebut dan ditandakan sebagai ek 'HBH–2'.

[27] So, it can be surmised that paras 16(a) and 16(b) of the plaintiff's affidavit in reply in encl 13 relate to the third defendant's written admission and the write-ups in the local newspaper. It had nothing to do with ascertaining the identity of '*Aiman*'. Incidentally, the newspaper article, strictly speaking, should be considered as hearsay and the statements therein ought not to be taken as the truth. It is inadmissible (*Public Prosecutor v Neoh Boon Cheong* [1960] MLJ 31 at 33).

[28] It must be emphasised that from the very beginning the plaintiff requested for a meeting with the third defendant together with the representatives from the first and the second defendants. Indeed if the plaintiff did not know that '*Aiman*' referred to the third defendant then why did the plaintiff request for the presence of the third defendant at that meeting?

[29] It must also be recalled to mind that Abang Sham was the first defendant's artiste and repertoire manager and was also a 'friend' of the third defendant. Abang Sham too was one of the plaintiff's entourage at the first and the second meetings. So it was just impossible that the plaintiff did not know who '*Aiman*' was.

Argument (b)

[30] I think it would be appropriate to pose this crucial question (more in the nature of a million dollar question):

> If the second meeting was not for the resolution of the dispute between the parties as to the copyright of the song, what then was the meeting for?

[31] The plaintiff pointed out that that meeting was to ascertain the identity of 'Aiman'. It was indeed a tall tale and it has been shown to be a figment of the plaintiff's imagination.

[32] If that meeting was not meant to settle the dispute between the parties, why must the plaintiff plead in his *'Jawapan Plaintif Kepada Pembelaan Defendan Pertama Dan Kedua'* as per encl 9 the question of settlement? In its original text, para 7(a) of the *'Jawapan Plaintif Kepada Pembelaan Defendan Pertama Dan Kedua'* was worded as follows:

> 7 Plaintif merujuk kepada perenggan 16 hingga 23, pembelaan defendan pertama dan kedua (dan) ingin menegaskan tanpa prejudis seperti berikut;
>
> (a) bahawa sebarang fakta material mengenai surat-menyurat dan pertemuan antara pihak-pihak seperti yang didakwa hanya merupakan minit-minit pertemuan untuk penyelesaian pihak-pihak terbabit sahaja dan samada ia berjaya atau tidak adalah di luar bidangkuasa mahkamah.

[33] At this juncture, it would be ideal to reproduce the relevant paragraphs in the 'Statement of Defence and Counterclaim for the First and the Second Defendants' as seen at encl 7:

> 16 On or about 17 July 2003, the plaintiff accompanied by Othman Mahmood, Sham Amir Hussin ('Sham') and another individual together with a number of reporters from various newspapers invited by the plaintiff, attended at the first defendant's office to meet with the third defendant and Mr Foo Meng Wooi ('Foo'), a senior manager of the first defendant. The plaintiff asked and/or intended that the reporters be present during the meeting. It was only on Foo's protest that the reporters left the meeting room.
>
> 17 During the said meeting, the plaintiff alleged that he composed and owned the alleged song and that the said song was a copy or a substantial copy of the alleged song. The plaintiff did not produce or offer any evidence in support of his claims save for a recording of an edited version of the alleged song, which was played very briefly to the third defendant and Foo. The defendants did not agree that that was acceptable as sufficient or satisfactory proof of the plaintiff's claims.
>
> 18 The first and second defendants were nevertheless at all times amicable to addressing the plaintiff's claims if the claims were satisfactorily and legitimately established.
>
> 19 Subsequent to the said meeting, the plaintiff's solicitors wrote to the first defendant on or about 24 July 2003, claiming that the plaintiff was the original song writer and lyricist of the alleged song and further, that the said song had copied or substantially copied the alleged Song without the plaintiff's permission. The said solicitors' letter further averred possession of 'all the necessary evidence' to prove the plaintiff's claim.
>
> 20 The first defendant referred the said plaintiff's solicitors' letter to its solicitors, Messrs Tay & Partners, for advice. The first defendant's solicitors wrote to the plaintiff's solicitors on or about 30 July 2003 requesting for time to take necessary instructions.

21 On or about 5 August 2003, the plaintiff together with Othman Mahmood, Othman Mahfar, believed to be the plaintiff's lawyer, and another individual met with representatives of the first and second defendants and the third defendant at the first defendant's office. The material facts of the said meeting are as follows:

(a) The plaintiff alleged that the said song is a copy or substantial copy of the alleged song.

(b) The plaintiff demanded payment of the exorbitant sum of RM800,000 from the first and second defendants.

(c) The plaintiff further demanded to have 100% ownership of the said song, including copyright ownership of both the musical work and literary work (lyrics) comprised therein, despite the fact (without admission that the plaintiff owns copyright or has entitlement to the musical work of the said song) that it was agreed by the plaintiff that Hani MJ was the writer of the lyrics for the said song and that there was no similarity between the said lyrics and lyrics of the alleged song. This was unreasonable and not acceptable to the first and second defendants.

(d) The first and second defendants maintained that if the said song was satisfactorily and legitimately established to be a copy or a substantial copy of the alleged song, which is strenuously denied, the first and second defendants would be agreeable to addressing the plaintiffs claims by acknowledging his right and giving him due credit as composer and paying royalties due to him as composer in accordance with industry practice, standard and rates.

(e) The first and seconnd defendants requested the plaintiff for a copy of the alleged song to assess and ascertain for themselves if there was ground for the plaintiffs' claims.

(f) The plaintiff and his lawyer, Othman Mahfar, agreed to provide a copy of the alleged song upon the first and second defendants making the request in writing.

22 In a reply dated on or about 7 August 2003 and in response to the plaintiff's solicitors' letter of 24 July 2003, the first and second defendants' solicitors requested, *inter alia*, to be provided with a copy of the alleged song allegedly sung by Mary Doreen Jackson and aired by RTM in programs known as 'Anggun' and 'Muzik TV' as well as other evidence and/or documents that may be available in support of the plaintiff's claims. The first and second defendants' solicitors reasonably stated in their said letter that they would not be able to rely solely on the plaintiff's assertions in evaluating his claims but would require the evidence and documents requested and at the least, a copy of the alleged song. The said letter further stated that the first and second defendants were not adverse to taking steps to resolving the matter amicably if they were satisfied that the plaintiff's claims were justifiably supported by the evidence furnished.

[34] These paragraphs are certainly self-explanatory. It would be manifestly unjust for the plaintiff to approbate and reprobate whenever it suits his fancies. At the very least, the plaintiff has admitted that the first and the third meetings were for purposes of settlement. Now, in para 13 of the plaintiff's affidavit in reply in encl 13, the plaintiff freely admitted that the discussions between the parties proved unsuccessful even though the plaintiff had taken steps to settle the matter in an amicable way. Paragraph 13 of encl 13 was worded in this way:

> 13 Saya ingin menambah bahawa siri perbincangan yang telah diadakan di antara pihak-pihak berkenaan tidak berjaya kerana sikap yang tidak professional serta angkuh ('arrogant') ditunjukkan oleh sama ada defendan pertama, Kedua mahupun ketiga dan sebaliknya, saya bersama peguam saya pula telah dihina oleh mereka di dalam perbincangan itu walaupun kami mengambil langkah untuk menyelesaikan secara baik dengan menemui mereka.

and this very paragraph aptly answered the one million dollar question posed earlier. As if to confirm that the meeting was indeed scheduled to settle the dispute between the parties, the plaintiff averred in his affidavit in encl 13 at para 15(b) to this effect (in its original text):

> 15 Merujuk kepada perenggan 39 hingga 42 affidavit tersebut, saya ingin menyatakan bahawa:
>
> (b) pengakuan bertulis oleh defendan ketiga adalah dibuat atas syarat bahawa penyelesaian akan dicapai di luar mahkamah dan bukannya atas syarat tiada tindakan undang-undang ke atas beliau.

[35] So, if the second meeting was not for settlement purposes, why should the plaintiff admit in para 15(b) of encl 13 that the hand written admission of the third defendant was made on condition that settlement will be reached out of court? It was indeed incomprehensible on the part of the plaintiff to argue as to whether the negotiations were genuinely aimed at arriving at a settlement. The parties were entitled to speak freely during the negotiations and if the negotiations broke down they cannot be held accountable for it. In *Oh Kuang Liang v Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390 at 394, I had occasion to say the same thing. This was what I said:

> I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence.

[36] Indeed if there were anything less than genuine then certainly the plaintiff was to be blamed since the first and the second meetings were engineered by

the plaintiff whereas the third meeting saw the third defendant holding fast to his offer to resolve the matter with the first and the second defendants attempting to resolve the matter, once and for all. It was at the second meeting that the plaintiff and the third defendant agreed that another meeting would be held to discuss amongst others, the issue of royalty payment.

[37] The sum total of it all would be this. That all the meetings were designed for the parties to meet and settle their disputes amicably. The fact that these attempts at settlement failed was not disputed. Communications made with a view to settle disputes between the parties must be held to be privileged communications and outside the purview of the courts.

[38] In *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, the House of Lords held that genuine negotiations with a view to settlement are certainly protected from disclosure whether or not the '*without prejudice*' label has been expressly applied to the negotiations or otherwise. So long as the negotiations were conducted by the parties to the dispute, whether or not they were assisted by legal advisers or otherwise, the principle of law as set out in *Rush & Tompkins Ltd v Greater London Council* would still be applicable.

Argument (c)

[39] The plaintiff and the third defendant have been using the phrase '*out of court settlement*' on a number of occasions. That phrase has seen better days and the parties — referring to the plaintiff and the third defendant, have employed semantics to outwit one another. At any rate, the phrase '*out of court settlement*' can refer to a civil resolution between the parties without any pending litigation. It can even refer to a situation where there has been a pending litigation and the parties thereto meant to resolve the dispute without proceeding further with the litigation. The plaintiff's claim that litigation must be pending in court before the '*without prejudice*' communications can take place cannot be accepted by this court. It renders the public policy of encouraging the parties to resolve their dispute amicably between themselves without resorting to the courts, meaningless. If what the plaintiff is proposing is in fact the law of this country, then when a dispute is brought to the notice of the offending party, the offending party cannot offer any resolution to resolve the matter simply because whatever he says will be used against him in a court of law. The offending party will have to wait until the matter is brought to court before commencing any negotiations whatsoever. This is patently wrong. It is not the law of this country. The plaintiff heavily relied on the case of *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257 and pointed out that where there was no dispute there cannot be any without prejudice communication. With respect, the facts in Ted Bates can readily be distinguished with the present case at hand. In reality, Lee Hun Hoe CJ (Borneo) who delivered the decision of the Federal Court in *Ted Bates* stated the law in this way (see p 258 of the report):

The question of prejudice has no application unless a person is in dispute or negotiation with another at the time.

[40] And the facts in *Ted Bates* may be stated in this way. It was not the policy of the appellants' company to own property in Malaysia. So the appellants' company negotiated with the respondent whereby they would assist the respondent financially to acquire the 4 1/2 storey premises known as no 281, Jalan Tuanku Abdul Rahman, Kuala Lumpur and to repair and construct an additional 2 1/2 storeys to the premises. In return for the financial assistance, the respondent would lease the premises comprising seven storeys to the appellants for a period often years. The money that would be paid would be treated as advanced payment for the 10 year rental. So in order to legalise the transaction, the parties executed the lease agreement and the supplementary agreement in May 1975. Trouble began when planning permission for the additional 2 1/2 storeys was refused by the relevant authority. Without the additional 2 1/2 storeys, the premises would not be suitable for the appellants and so the latter exercised their rights under the agreements by terminating the lease by notice in writing and demanded that the respondent refund them the sum of $250,000. The respondent admitted owing the money and asked for time to repay. By letter dated 7 August 1975, Ms Dulip Singh & Co acting for the respondent wrote to the appellants the following (see p 258 of the report):

> We are instructed to state that our client is making arrangements to repay the said sum of $250,000. However, he shall be pleased if you will kindly permit him to settle the said sum within a period of five years upon his undertaking to pay interest on the said sum at the agreed rate.

[41] And Lee Hun Hoe CJ (Borneo) had this to say of the letter (see p 258 of the report):

> The learned judge considered that that letter should have been regarded as written without prejudice. With respect, we think he is wrong. This has no application to a case where a man says he owes another a certain sum but merely asks for time to repay the sum. The letter was not even headed without prejudice. How could a letter written in such a situation be said to be written under prejudice.

[42] Further down the same page and spilling over to p 259 of the report, Lee Hun Hoe CJ (Borneo) summed up the matter in these salient words:

> Respondent acquired the premises with the financial aid of the appellants. What respondent is saying now is that 'the agreements are void and not enforceable, therefore, I am going to keep the property and I do not have to pay the money lent'. In other words, he wants to have the cake and to eat it. Whether the money is a deposit or a loan it is still recoverable. Suppose A owes C money. A asks B to pay C. B pays C. It would be ridiculous for A to say that he did not receive the money.

[43] Factually, the present case at hand are poles apart from *Ted Bates*. There was no dispute in *Ted Bates* at the time the written admission was made. Here, in the present case at hand, at the very first meeting itself between the parties,

a dispute as to the copyright of a song was brought to the attention of the defendants' notice.

[44] Now, the allegation that the third defendant's admission was voluntarily made, if true, in no way stripped the said admission from being protected as privileged communication particularly since it was for the purpose of establishing a basis of compromise. The plaintiff seemed to think that as long as the admission was voluntarily made, without threat or coercion or undue influence, it can be used to his advantage. That cannot be the law of this country. It must be emphasised that the law that gives the protection of privilege to *'without prejudice'* correspondence depends according to Parker LJ in *South Shropshire District Council v Amos* (1986) 1 WLR 1271 at 1277 'partly on public policy, namely the need to facilitate compromise, and partly on implied agreement.'

[45] In regard to the *'implied agreement'*, its very nature must necessarily depend on the meaning that has to be assigned to the phrase '*without prejudice*' Lindley LJ in *Walker v Wilsher*, at p 337 aptly defined the phrase *'without prejudice'* in these salient words:

> What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

[46] This classic definition of the phrase *'without prejudice'* was said by Lindley L J in *Walker v Wilsher* (supra) by way of an obiter, yet it was expressly approved by the English Court of Appeal in *Tomlin v Standard Telephones & Cables Ltd* (1969) 1 WLR 1378 (see particularly the judgments of Danckwerts LJ at p 1383 and Ormrod J at pp 1384–1385, and although Ormrod J dissented in the result, yet on the issue of '*without prejudice*' communication his Lordship agreed with the majority). The classic definition of Lindley LJ in *Walker v Wilsher* (supra) was also cited with approval by Oliver LJ and Fox LJ in the Court of Appeal in the case of *Cutts v Head and another* [1984] 1 ALL ER 597. At this juncture, I think it is ideal to refer to the speech of Oliver LJ in *Cutts v Head and another* particularly at p 605–606 thereto:

> That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151, at 157, be encouraged fully and frankly to put their cards on the table. The public policy justification, in truth, essentially rests on the desirability of preventing statements

or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

[47] In the same vein, Fox LJ in *Cutts v Head And Another* (supra) had this to say at p 611 of the report:

> As to public policy it obviously is desirable to facilitate compromise rather than forcing the parties to litigate to the end. But to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiations failed. So he would make his offer without prejudice to his position if the offer was refused. But that was unfair to the other party. It was one sided. So it was necessary to extend the without prejudice umbrella to cover both parties.

[48] Approaching the present case on the basis of these well established principles, the presence of the plaintiff's counsel at the third meeting clearly demonstrated that the meeting was held on a '*without prejudice*' basis. And the fact that there was in existence a written undertaking by the plaintiff not to take any legal action against the third defendant or to lodge any police report against the third defendant weighed heavily in favour of the third defendant.

Argument (d)

[49] I have reproduced para 11 of the statement of claim in the early part of this judgment and I must say that it referred to the substance of the privileged communications between the plaintiff and the third defendant. It was as clear as crystal that the plaintiff was relying on the third defendant's hand written admission as evidence of his claim. This would run counter to O 18 r 7(1) of the RHC which states as follows:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, *but not the evidence by which those facts are to be proved*, and the statement must be as brief as the nature of the case admits.

[50] In short, pleadings should be statements drafted in a summary form and should state only the material facts relied upon and not the evidence by which they are to be proved. According to Brett J, in *Hammer v Flight* (1876) 24 WR 347 that 'pleadings now are to be merely concise statements of facts which the party pleading deems material to his case'. So it can be surmised that a pleading should only state:

(1) the material facts and not the law;

(2) the material facts and not the evidence; and

(3) the material facts only in a summary form.

[51] Thus, it would not be an answer for the plaintiff to simply say that the impugned para 11 of the statement of claim was merely part and parcel of the sequence of events and that they ought to be pleaded. As I said, only the material facts must be pleaded and not the evidence.

THE PLAINTIFF'S OWN ADMISSION AND UNDERTAKING

[52] The plaintiff admitted that even though there was a third meeting after the second meeting, no settlement was reached between the parties. In the plaintiff's own words as seen at para 13 of encl 13 which was reproduced earlier there was a series of discussions between the parties which turned out to be futile ('*bahawa siri perbincangan yang telah diadakan di antara pihak-pihak berkenaan tidak berjaya*') Thus, pursuant to the '*without prejudice*' rule, the third defendant's hand written admission cannot be referred to or even disclosed in these proceedings.

[53] The '*without prejudice*' rule is all encompassing. It is a time honoured rule. It has been applied worldwide and it is a rule governing the admissibility of evidence and it is founded on the concept of public policy of encouraging and not discouraging litigants to settle their differences amicably rather than litigate them in a court of law. The parties should not be discouraged by the knowledge that anything that is said in the course of the negotiations may be used to their prejudice in the course of the proceedings. The parties should be encouraged to put their cards on the table (to borrow the words of *Clauson J* in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 156) and to feel free to discuss, argue, debate, resolve and settle their disputes amicably without resorting to litigation. The '*without prejudice*' tag need not be written on the document in order to prevent that document from being given in evidence. Of crucial importance is to look at the surrounding circumstances in order to ascertain whether the parties were indeed seeking to compromise the dispute. And if that can be seen from the surrounding circumstances then the '*without prejudice*' rule would be put in motion. It seems to me that the underlying purpose of the '*without prejudice*' rule is basically to protect a potential litigant from being embarrassed by any admission made purely in an attempt to achieve an amicable settlement.

[54] Now, in exhibiting the third defendant's hand written admission, the plaintiff has clearly transgressed the '*without prejudice*' rule. The plaintiff's learned counsel should have known better than to allow such a blatant disregard of the law. It must be observed that the third defendant's hand written admission must surely prejudice the third defendant's defence and it clearly demonstrated the *mala fide* of the plaintiff.

[55] Reverting back to the plaintiff's own admission that he has given the third defendant an undertaking that, *inter alia*, he would not take legal action

against the third defendant, there was no denial by the plaintiff that he has given such an undertaking. In the absence of such a denial, it must be construed to be admitted (*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; and *Amalgamated Steel Mills Bhd v Ingeback (Malaysia) Sdn Bhd* [1990] 2 MLJ 374). It is the plaintiff who by his words or conduct has made a representation of fact with the intention of inducing the third defendant on the faith of that representation to alter his position, and the plaintiff is subsequently estopped from denying as against the third defendant that the facts were as represented (see the speech of Sir Raymond Evershed MR in *Hopgood v Brown* [1955] 1 All ER 550 at 559; *Carr v London & North Western Railway Co* (1875) LR 10 CP 307; and *Smith v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154).

STRIKING OUT PARA 11 OF THE STATEMENT OF CLAIM

[56] I would certainly be empowered under O 18 r 19(1) (b), (c) and (d) of the RHC to strike out para 11 of the statement of claim. It was certainly scandalous, frivolous or vexatious as envisaged under O 18 r 19(1)(b) of the RHC on the part of the plaintiff to incorporate para 11 of the statement of claim. This court has the general jurisdiction to expunge scandalous paras in any pleadings (*Re Miller* (1884) 54 LJ Ch 205). As phrased and framed, para 11 of the statement of claim was clearly frivolous and to let it remain would tantamount to an abuse of the process of the court (*Young v Holloway* (1895) P 90; and *Whitworth v Darbishire* (1893) 68 LT 216). The words '*frivolous or vexatious*' refer to cases which are obviously unsustainable (*AG of Duchy of Lancaster v L & NW Ry* (1892) 3 Ch p 277; *Day v William Hill (Park Lane), Ltd* [1949] 1 KB 632; and *Law v Dearnley* [1950] 1 All ER 124) in the context of the '*without prejudice*' rule.

[57] The words '*it may prejudice, embarrass or delay the fair trial of the action*' as set out in O 18 r 19(1)(c) of the RHC must be given a wide and liberal interpretation (*Berdan v Greenwood* (1878) 3 Ex D 256). The prejudice that the third defendant would suffer by the presence of para 11 of the statement of claim can never be quantified. The fair trial of the action would be prejudiced if para 11 of the statement of claim was allowed to remain (*Rassam v Budge* [1893] 1 QB 571; *Liardet v Hammond Electric Light Co* (1883) 31 WR 710; and *Mudge v Penge UDC* (1916) 85 LJ Ch 814 CA).

[58] Striking out for being an abuse of the process of the court under O 18 r 19(1)(d) of the RHC envisages the situation where the process of the court has not been used in a *bona fide* manner and that it has been abused. It goes without saying that the court will prevent its machinery from being used improperly (*Castro v Murray* (1875) 10 Ex 213; and *Dawkins v Prince Edward of Saxe Weimar, Willis v Earl Beauchamp* (1886) 11 P 59 at 63). It was an abuse of the process of the court when the plaintiff incorporated para 11 to the statement of claim because it contravened the '*without prejudice*' rule. Finally,

the contravention of this rule too necessitated the striking out of the same paragraph under the inherent jurisdiction of the court as envisaged under O 92 r 4 of the RHC.

CONCLUSION

[59] For the reasons as adumbrated above, I allowed the appeal of the third defendant in encl 14 with costs. This meant that prayers (i) and (ii) of encl 12 were allowed.

Third defendant's appeal allowed.

Reported by Kanesh Sundrum